2-21-2017

Manwaring Investments v. City of Blackfoot Respondent's Brief Dckt. 44393

IN THE SUPREME COURT OF THE STATE OF IDAHO

MANWARING INVESTMENTS, , L.C., an Idaho limited liability company, Plaintiff/Appellant v. CITY OF BLACKFOOT, Defendant/Respondent.	Supreme Court No. 44393 Bingham County Case No. CV 2014-1958

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District for Bingham County.

Honorable Darren B. Simpson, District Judge, presiding.

Kipp L. Manwaring
2677 East 17th Street, Ste. 600
Idaho Falls, ID 83406

Attorney for Appellant

Garrett H. Sandow
220 N. Meridian
Blackfoot, ID 83221

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Pages

State and Federal Case Law

Idaho Rules of Civil Procedure and Appellate Rules

Other Authorities and Statutes

STATEMENT OF THE CASE

A. Statement of the Case.

This case involves the appeal of the District Court's affirmation that the Magistrate Court was correct in granting summary judgment in favor of the City of Blackfoot. The Magistrate's ruling on summary judgment confirmed the City of Blackfoot's sewer fee structure was reasonable under Idaho law. The Plaintiff, Manwaring Investments, L.C. (hereinafter referred to as "MILC") filed this appeal.

B. Course of Proceedings.

The Course of Proceedings set forth in Appellant's Brief is accurate and will not be restated here.

C. Statement of Facts.

All of the relevant facts were uncontested in this matter and are accurately set forth in the District Court's Decision and Order on Appeal dated June 22, 2016.

Like most cities in the State, the City of Blackfoot operates its' own wastewater system for the sewage created by the citizens of Blackfoot and some surrounding properties. Pursuant to the Idaho Revenue Bond Act, the City operates the wastewater system independent of the other City operations. By that, the City cannot use general tax revenue to support the wastewater system, nor can the City take revenue from the wastewater system and use it for general purposes. The wastewater system must stand alone and be self supporting. I.C.§ 50-1032.

Accordingly, the City is required each year to look at the probable revenue, expenses, debt payments, and reasonable reserves in order to create a budget that is solely for the wastewater system. The City examines engineering studies, economic forecasts, maintenance issues, required reserves, and other information each year to develop a system of fees that must be charged.

If fees must be increased, appropriate public notice is given, a public hearing is held, and the City Council determines what should happen with any potential increase in fees.

Unfortunately, there is no exact or precise way to charge for sewer fees. It is not simply an issue of quantity of water consumed on the premises. It is an issue of quantity of water, type of consumption, type of waste put into the water, quantity of waste put into the water, and many other factors. So, the City must consider all of these factors in establishing a reasonably fair and equitable rate.

Based upon this type of information, the City of Blackfoot passed successive ordinances over the years that try to class groups of users as fairly and equitably as possible. In summary, the City determined that the average residential user would create 350 gallons per day, and that would equate to one sewer charge, or one "EDU."

In this case the primary argument of MILC is it is being charged unfairly, as it does not use 350 gallons per day of water, which is the average amount in residential users for one sewer fee. However, as will be discussed in more detail below, this argument fails as the City's fee structure is set up on averages within different classes of users.

The City attempts to assess each building into an average class that would fairly represent the nature and use of the wastewater system. The City has developed a formula of trying to equate the

wastewater use to an Equivalent Dwelling Unit. ("EDU"). Essentially, each class of use is assigned a multiplier point (based upon type of use) and then a point value is determined which is equal to how many EDU's that particular property is assessed. (An EDU, or the point value, are used interchangeably under Blackfoot's system) That point value is then multiplied against the current commercial rate of $30.04 per EDU. For example, currently on office buildings, they are looked at to determine how many different business entities can be housed in the building and/or the total size of the building. A building that only houses one business and is under 4,000 square feet would be assessed 1 point. Thus, the total sewer charge would be $30.04 per month. A building that is over 4,000 square feet would be assessed 2 points. A building with two businesses would be assessed two points. Thus, the total sewer charge would be $60.08 per month in either building. Other types of users are assessed different levels of points depending on the type of sewage emitted.

Notably, MILC concedes that the base rate of $30.04 is reasonable and justified under Idaho law. It's main argument is assessing two EDU's on its' building is inappropriate.

With MILC's building at issue in this case, it is a building of over 5,000 square feet, and is divided into two separate halves, wherein each side could house at least one business, if not more. Based upon Blackfoot's formulation, since it over 4,000 square feet the MILC building receives an EDU point value of 2, and because it can house two separate business, if not more, it would receive an EDU point value of at least 2 for that reason as well. Thus, the point value of 2 multiplied by the current commercial rate of $30.04, totals $60.08 per month.

No system is perfect and businesses change, grow, remodel, add-on, and alter the types of wastewater uses over the years. So the City of Blackfoot attempts to review each assessed building

periodically to ensure rates are being assessed as fairly as possible. Around September, 2008, MILC building was reassessed to the current appropriate fee (charged at 2 EDU's) as compared to similar buildings in Blackfoot.

Realistically, the City understands that MILC's building does use less water than the average. On the other hand, there will be many commercial buildings of similar size that use over the average of water consumption. That is the whole nature of averages. That is, by law, a reasonable and appropriate way to assess fees.

ISSUES PRESENTED ON APPEAL

Standard of Review on Appeal

A. The District Court was correct in applying IC § 50-219

B. The District Court was correct in concluding the City did not violate IC § 50-1028

C. The District Court was correct in ruling the City was not unreasonable or arbitrary

D. The District Court was correct that the City's sewer fees were not an unlawful tax

E. The District Court was correct that due process rights were not violated

F. MILC was not entitled to damages

G. MILC was not entitled to an injunction

H. The District Court correctly affirmed the Magistrate's denial of the Motion to Reconsider

I. MILC is not entitled to an award of costs and attorney's fees on appeal

J. The City of Blackfoot is entitled to an award of costs and attorney's fees on appeal

ARGUMENTS ON APPEAL

Standard of Review

Summary judgment under I.R.C.P. 56(c) is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. On appeal, this Court exercises free review in determining whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Doe v. City of Elk River*, 144 Idaho 337, 160 P.3d 1272 (2007).

When an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probably inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences. Resolution of the possible conflict between inferences is within the responsibilities of the fact finder. *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991).

This Court exercises free review over the entire record that was before the lower court to determine whether either side was entitled to judgment as a matter of law and reviews the inferences drawn by the lower court to determine whether the record reasonably supports those inferences. *Big Wood Ranch, LLC v. Water User' Ass'n of Broadford Slouth & Rockwell Bypass Lateral Ditches, Inc.* 158 Idaho 225, 345 P.3d 1015 (2015); *Liberty Bankers Life Ins. Co. v. Witherspoon, Kelley, Davenport & Toole, P.S.*, 159 Idaho 679, 365 P.3d 1033 (2016).

Where an order of a lower court is correct, but based on an erroneous theory, the order will be affirmed upon the correct theory. *Syringa Networks, LLC v. Idaho Department of Administration*, 159 Idaho 813, 367 P.3d 298 (2016).

A. The District Court was correct in applying IC § 50-219

In reviewing the Magistrate Court's decision, the District Court also correctly determined that MILC failed to effect timely notice of its' pre-2014 claim against the City. The City directly attacked MILC's failure to exhaust administrative remedies. The Magistrate Court found that MILC failed to attempt to remedy its' perceived injustice through the administrative process that was readily available. The District Court made the same determination as the Magistrate Court, with the additional theory of I.C. § 50-219.

As stated by the District Court, based upon the billing statements provided by MILC, it is readily apparent that when the City first increased MILC"s building EDU assessment to 2, which occurred in 2007 or 2008, the charge next to the word "Sewer" would have doubled from the previous month. Decision and Order on Appeal, page 21. Under Idaho Code § 50-219 and § 6-906, the time limits begin to run when a reasonably prudent person is aware of such facts to inquire further into the circumstances. *BHA Investments, Inc. V. City of Boise*, 141 Idaho 168, 108 P.3d 315 (2004).

In the case at hand, MILC would have been required to submit a claim for the original increased assessment sometime in 2007 or 2008, within 180 days, of when the rate was first increased. The record is clear that did not occur. Thus, the District Court was correct with the additional theory that any claims prior to September 9, 2014, when the claim was first brought to the City, are barred.

B. The District Court was correct in concluding the City did not violate IC § 50-1028

There has been no evidence presented whatsoever that supports the allegation that the City is violating I.C. § 50-1028. The only evidence presented was an affidavit of Lance Bates, who opined as to the methods used by the City of Ammon for its' wastewater rates and as to national standards. This affidavit became largely meaningless when MILC conceded the underlying fee for 1 EDU is reasonable. Nothing in the law requires the City of Blackfoot to adopt the City of Ammon's methods of charging rates or to use Mr. Bates opined methods.

The City of Blackfoot operates squarely within the Idaho Revenue Bond Act. The City of Blackfoot operates its' wastewater system as an independent enterprise, separated entirely from other general functions of the City. The primary basis for a wastewater system to be self supporting comes from two main provisions of the Idaho Revenue Bond Act. The grant of this authority is set forth in Idaho Code § 50-1028 as follows:

> Any City acquiring, constructing, reconstructing, improving, bettering or extending any works pursuant to this act, shall manage such works in the most efficient manner consistent with sound economy and public advantage, to the end that the services of such works shall be furnished at the lowest possible cost. No city shall operate any works primarily as a source of revenue to the city, but shall operate all such works for the use and benefit of those served by such works and for the promotion of the welfare and for the improvement of the health, safety, comfort and convenience of the inhabitants of the city.

Second, it is well established that a wastewater system developed under the Idaho Revenue Bond Act must be self supporting. Idaho Code § 50-1031 provides as follows:

> The council of a city issuing bonds pursuant to this act shall prescribe and collect reasonable rates, fees, tolls or charges for the services, facilities and commodities furnished by such works

> or rehabilitated existing electrical generating facilities, and shall revise such rates, fees, tolls or charges from time to time, to provide that all such works or rehabilitated existing electrical generating facilities shall be and always remain self-supporting. The rates, fees, tolls or charges prescribed shall be such as will produce revenue at least sufficient, (a) to pay when due all bonds and interest thereon for the payment of which such revenue is or shall have been pledged, charged or otherwise encumbered including reserves therefor, and (b) to provide for all expenses of operation and maintenance of such works or rehabilitated existing electrical generating facilities, including reserves therefor.

Based upon the foregoing statutes, as a matter of law, the City of Blackfoot is empowered to assess rates, fees and other charges, and revise from time to time as needed, the sewer rates charged for use of the wastewater system. Notably, the statutes do not prescribe ***how*** that is to be done. It only has to be reasonably fair to the patrons, and enable the wastewater system to be self supporting.

The Magistrate Court was provided with evidence as to how the City of Blackfoot structured its' rates. The City is not required to use the methodology supplied by Lance Bates. This is a factual question, not a legal determination. The Magistrate Court correctly upheld the City's rates.

Furthermore, it is worth repeating that MILC concedes that the underlying rate of $30.04 per EDU is reasonable. This concession, in and of itself, invalidates any argument that the City has somehow violated the Idaho Revenue Bond Act.

MILC attempts to argue that the sewer fees charged to MILC do not bear a reasonable relationship to the costs of services provided to MILC. Again, MILC misses the point because when dealing with sewer fees the City is dealing with averages. It cannot precisely measure each and every user of the system. It cannot conduct a monthly audit of each and every residence and business. Some users produce greater flow and some users produce less. It is not an exact system, but it is not required to be exact.

The evidence presented to the Magistrate Court on this issue was uncontradicted. Blackfoot's waste water system is self supporting. It does not receive general fund taxes, nor does it supply revenue to the general fund taxes. It is a stand alone component of the City. Thus, there is no violation of the Idaho Revenue Bond act. The District Court correctly affirmed the Magistrate's ruling on this issue.

C. The District Court was correct in ruling the City was not unreasonable or arbitrary in its' application of EDU multipliers.

The challenging party bears the burden of proving the ordinance or its application is arbitrary. *State v. Bowman*, 104 Idaho 39, 655 P.2d 933 (1982). In this case, there was no evidence that the City's methodology is arbitrary. The only evidence presented to the Magistrate Court was of other methods used in other cities or of engineering standards that were utilized in other cities. The express purpose of the Blackfoot City Ordinance was to distribute costs to each sewer user in approximate portion to such users contribution to the total wastewater load. Specifically, the City Code provides:

> The city currently does not have the technology or ability to measure each class's exact use of the sewer system. Therefore, the rates are based on an estimate of each class's contribution or potential contribution to the loading of the sewer system. *Blackfoot City Code 9-3-20.*

The Blackfoot City Code then sets out 19 different classifications and 74 different sub-classifications. Distributing costs in approximate portion to each class of users flow is not arbitrary.

There was no evidence presented that suggests Blackfoot's system is arbitrary. On the contrary, the relevant evidence provided to the Magistrate Court supports Blackfoot's methodology as reasonable.

The evidence presented shows the City of Blackfoot charges a flat rate for commercial users and then uses a point system to adjust the rate based upon the EDU of the particular building. The City's system does not factor into the water usage being provided to the building. What the City does do is assess by type of building, size of building, type of business, number of businesses, type of waste water released, and other similar factors. That is not an arbitrary system. As a matter of law, this system is sufficient and reasonable.

In *Kootenai County Property Assn v. Kootenai County*, 115 Idaho 676, 769 P.2d 553 (1989), the property owners challenged the appropriateness of a flat fee rate imposed instead of a rate which reflected actual use. The Court held that the flat fee rate was reasonable even though it was possible to monitor solid waste disposal and charge a fee based upon actual use. The legislature has not imposed exacting rate requirements upon localities and the law requires only that the fee be reasonably related to the benefit conveyed. *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991). Furthermore, and more importantly, the Court in *Loomis* held as follows:

> It is not the province of this Court to determine how a municipality should allocate its fee and rate system. So long as the fees and rates charged conform to the statutory requirements and are reasonable, the fees, rates and charges will be upheld. The fees, rates and charges imposed by the municipality must be reasonable and produce sufficient revenue to support the system at the lowest possible cost as required by the Idaho Revenue Bond Act.
> *Loomis*, 119 Idaho 434.

Although fairness and equity must be considered, Idaho statutes require only that the fees be reasonable and not imposed arbitrarily. The *Loomis* Court further stated:

> This Court has never imposed on municipalities an orthodoxy of ratemaking. Nor has it been enough that a Court differed from the municipality as to the basis for the rates. This is not a function of a court in reviewing whether the fixing of rates was arbitrary or unreasonable. By their very nature sewer rates cannot be fixed so that they will apply with exactness. *Loomis*, 119 Idaho 434.

As stated earlier, the primary arguments surrounding MILC's case deal with the specific application to a specific building. MILC wants the system to be perfect. It is not. It deals with averages. It's unfortunate that MILC's building may fall to the low side of average use, but that does not lead to an inference of the system being unreasonable or arbitrary.

With the evidence provided to the Magistrate Court, the City of Blackfoot has met it's statutory requirements. The only evidence MILC presented to the Magistrate was of one other community, the City of Ammon. This does not lead to an inference that Blackfoot's system of charging fee is then inappropriate. The District Court ruled correctly that Blackfoot's system was not arbitrary.

D. The District Court was correct that the City's sewer fees were not an unlawful tax

The City agrees with MILC, and it bears repeating, that when sewer fees conform to the statutory scheme set forth in the Idaho Revenue Bond Act or are imposed pursuant to a valid police power, the charges are not to be construed as taxes. *Schmidt v. Village of Kimberly*, 74 Idaho 48, 256 P .2d 515 (1953). "However, if the rates, fees and charges are imposed primarily for revenue raising purposes, they are in essence disguised taxes and subject to legislative approval and authority."

Loomis v. City of Hailey, 119 Idaho 434, 438 807 P.2d 1272 (1991) citing *Brewster v. City of Pocatello*, 115 Idaho 502, 768 P.2d 765 (1989).

As set forth above in discussing I.C. § 50-1028, in this case there was absolutely no evidence presented which could lead one to believe the rates charged by the City of Blackfoot are for revenue raising purposes. The City of Blackfoot operates its' sewer system separately and apart from the general tax funded operations. In fact, and as stated before, MILC concedes the underlying fee for each EDU is reasonable. For these reasons, the sewer fees are not an unlawful tax.

MILC incorrectly relies upon *North Idaho Building Contractors Association v. City of Hayden*, 158 Idaho 79, 343 P.3d 1086 (2015). MILC claims it is an unreasonable tax, if evidence shows the actual costs of providing services bears no relationship to the rate charged. In *North Idaho Building Contractors*, the City of Hayden had nearly tripled the required "buy-in" fee for new users from a one time fee of $774.00, to an increased fee of $2,280.00. The City of Hayden could not point to any evidence that the actual cost of the hook-up had increased in that extreme. Since the fee increase did not correlate to a cost increase, the fee increase was overturned.

That is not the case at hand. The evidence presented in this case was the methodology the City of Blackfoot used in setting out 19 different classifications and 74 different sub-classifications of users. No evidence against the City was presented that attacked the City's computations. The very root of the problem with MILC's case is that MILC wants the City to be able to provide an exact fee for the service provided to each and every constituent. Exacting rate requirements are neither expected nor practical. *See Kootenai County and Loomis,* cited above. Where MILC misses the point is the Blackfoot fee structure is dealing with averages on each separate class. Some users will use a greater

volume of sewer service and some users will require a more minimal flow. That does not invalidate the sewer fee structure.

There was no evidence whatsoever that Blackfoot is violating the Idaho Revenue Bond Act. Thus, the District Court was correct in concluding the City's sewer fees are not an unlawful tax.

E. The District Court was correct that due process rights were not violated

Next, MILC argues that an increase in its' assessment to 2 EDU's somehow violated its' due process rights. MILC has not identified any protected property interest that it was allegedly deprived of when the fee was increased. As stated in *Viking Construction, Inc. v. Hayden Lake Irrigation District*, 149 Idaho 187, 233 P.3d 118 (2010), "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement for it. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). MILC has not shown any evidence of an entitlement to the lower fee.

MILC attempts to argue the City acknowledges this property right because it uses a form to assess each business periodically and provides a copy of that form to the patron. It is true the City does use an assessment sheet for purposes of recording the reasoning behind a certain assessment. This is given to the property owner. However, this is solely for educational purposes and to increase communication and understanding to the patron. It does not create a secured property right.

Furthermore, Blackfoot's City Code clearly states that applicable charges or the EDU classifications may be amended from time to time. *Blackfoot City Code 9-3-20.* As stated by the District Court, a certain classification or assessment is not secured under that ordinance whatsoever. There is not a protected property interest in a certain assessment.

MILC would have to show some property interest in the lower fee, and must point to something under Idaho law that creates that property interest. It has not done so. The due process claim fails and the District Court was correct in this regard.

F. MILC was not entitled to damages

Both the Magistrate Court and District Court found that MILC was not entitled to damages as it failed on all theories of recovery. If, for some reason, this Court determines there is a theory that needs to be reconsidered due to an issue of fact, damages would need to be addressed at that time. Damages would be limited to the post-2014 claims however, due to the application of I.C. § 50-219 and § 6-906 as discussed above. However, MILC has not shown a basis for recovery of any damages and the District Court ruling in that regard should be affirmed.

G. MILC was not entitled to an injunction

We agree that the standard of review regarding the grant or denial of an injunction is abuse of discretion. *Miller v. Bd. of Tr.*, 132 Idaho 244, 970 P.2d 512 (1998). The status quo in this case was

MILC paying 2 EDU's since sometime in 2007 or 2008. Over 6 years of 2 EDU's at the time of filing the claim against the City. The sole purpose of MILC's request for an injunction was to reduce the assessment to 1 EDU. This equates to an issue of $30.04 per month. Hardly irreparable harm to MILC as required. MILC did not show any irreparable harm, nor did it show a basis for an injunction. The Magistrate Court exercised its' discretion correctly and the District Court correctly affirmed that decision.

H. The District Court correctly affirmed the Magistrate's denial of the Motion to Reconsider.

As stated by the District Court, the ultimate decision by the Magistrate Court, and affirmed by the District Court, was that MILC failed on all theories of its' claim. Accordingly, the Magistrate Court did not abuse its' discretion in denying the Motion to Reconsider. The District Court's ruling in this regard should be affirmed.

I. MILC is not entitled to an award of costs and attorney's fees on appeal

Under I.C. § 12-117, the party seeking fees must be the prevailing party and the losing party must have acted without a reasonable basis in law or fact. In this case, MILC lost on all claims on summary judgment in Magistrate Division, and lost all claims on appeal in District Court. Clearly, MILC is not a prevailing party. Further, the City prevailed on summary judgment, which was upheld

on appeal. The City certainly has a reasonable basis in law and fact in its' position. MILC is not entitled to costs or attorney fees on appeal.

J. The City of Blackfoot is entitled to an award of costs and attorney's fees on appeal

As stated above, under I.C. § 12-117, I.A.R. 40 and 41, the City is entitled to recover costs and attorneys fees on appeal if it prevails and MILC is deemed to have acted without a reasonable basis in law or fact. MILC has lost on all claims at the Magistrate level and on appeal to the District Court. It does not have a reasonable basis in law or fact. The City should be awarded its' costs and attorney's fees on appeal.

CONCLUSION

Therefore, based upon the foregoing, it is respectfully requested that the District Court's Decision and Order on Appeal be affirmed.

DATED this 17 day of February, 2017.

Garrett H. Sandow

CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of February, 2017, I served a true and correct copy of the following-described document on the person(s) listed below by the following-described method:

Document Served: **RESPONDENT'S BRIEF ON APPEAL (two copies)**

Served:

Kipp Manwaring
2677 East 17th St., Suite 600
Idaho Falls, ID 83406

(X) US Mail, Postage Prepaid
( ) Facsimile
( ) Hand Delivery
( ) Courthouse Box

Garrett H. Sandow